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IN THE

Supreme Court of the United States

October Term, 1995

VILLAGE OF DEPEW, NEW YORK,

Petitioner,

vs.

WILLIAM M. GUMMO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the decision of the United States Court of Appeals for the Second Circuit in conflict with the rules regarding the retroactive application of statutes as set forth by this Court in *Rivers v. Roadway Express, Inc.*, ___ U.S.___, 114 S.Ct. 1510 (1994) and *Landgraf v. USI Film Products,* ___ U.S.___, 114 S.Ct. 1483 (1994)?

2. Does Section 4311(b) of the Uniformed Armed Services Employment and Reemployment Rights Act, 38 U.S.C. §4301 *et seq.* apply to cases that were pending when the Act was passed?

3. Did the United States Court of Appeals for the Second Circuit err in vacating summary judgment for the petitioner, where there was no evidence before the court that the plaintiff's membership in the Air Force Reserves was a determinative factor in the decision to terminate his employment?

List of Parties

The caption of the case contains the names of all parties.

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Petitioner the Village of Depew, New York respectfully prays that a writ of *certiorari* issue to review the decision and order of the United States Court of Appeals for the Second Circuit in this case.

Opinions and Orders Below

The Opinion of the United States Court of Appeals for the Second Circuit was issued on January 19, 1996. The Opinion has not been reported, and is reprinted in the Appendix at A1.

The Memorandum and Order of the United States District Court for the Western District of New York was issued on April 28, 1995. The Memorandum and Order is not reported, and is reprinted in the Appendix at A33. Judgment was entered on May 2, 1995, and is reprinted in the Appendix at A40.

Jurisdiction

Subject matter jurisdiction in the United States District Court for the Western District of New York was predicated on the Veterans' Reemployment Rights Act, 38 U.S.C. §2022. The United States Court of Appeals for the Second Circuit entered its Opinion vacating the judgment of the District Court and remanding for further proceedings on January 19, 1996.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1), and in accordance with Rule 10 of the Rules of this Court.

STATUTORY PROVISIONS INVOLVED

This case involves the Veterans' Reemployment Rights Act of 1968, 38 U.S.C. §2021 *et seq.* The specific provision at issue in this case is 38 U.S.C. §2021(b)(3), which was renumbered §4301(b)(3) pursuant to Pub.L.No. 102-568, §506 (1992). The provision reads as follows:

> (3) Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotions or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

The case also involves the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §4301, *et seq.* The specific provisions at issue are 38 U.S.C. §4311(b), Pub.L.No. 103-353, 108 Stat. 3153 §2; Pub.L.No. 103-353, 108 Stat. 3175 §8(b); and Pub.L.No. 103-353, 108 Stat. 3175 §8(a).

38 U.S.C. §4311(b) provides:

> (b) An employer shall be considered to have denied a person initial employment, reemployment, retention in employment, promotion, or a benefit of employment in violation of this section if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer

can prove that the action would have been taken in the absence of such membership, application for membership, performance of service, application for service, or obligation.

Pub.L.No. 103-353, 108 Stat. 3175 §8(b) provides:

(b) DISCRIMINATION.- The provisions of section 4311 of title 38, United States Code, as provided in the amendments made by this Act, and the provisions of subchapter III of chapter 43 of such title, as provided in the amendments made by this Act, that are necessary for the implementation of such section 4311 shall become effective on the date of enactment of this Act.

Pub.L.No. 103-353, 108 Stat. 3175 §8(a) provides in pertinent part:

(a) REEMPLOYMENT.

(1) Except as otherwise provided in this Act, the amendments made by this Act shall be effective with respect to reemployments initiated on or after the first day after the 60-day period beginning on the date of enactment of this Act.

(2) The provisions of chapter 43 of title 38, United States Code, in effect on the day before such date of enactment, shall continue to apply to reemployments initiated before the end of such 60-day period.

STATEMENT OF THE CASE

I. *The Factual Background*

William M. Gummo ["Gummo"] commenced his employment with the Village of Depew Police Department [the "Department"] on August 2, 1977 as a police officer. On December 12, 1986, Gummo enlisted in the United States Air Force Reserves. During substantially the entire time of Gummo's employment, the Department's policy required police officers to provide advance notice and authorization for time off from scheduled duty, including the prior submission of military orders which necessitated military leave. (A. 3-4, 34).

Gummo's failure to submit military orders for his 1989 tour of duty resulted in a confrontation between Gummo and Police Chief John T. Maccarone on January 4, 1989. Gummo yelled and screamed at the Chief, walked out of the Chief's office without being dismissed, and said in the presence of other Department employees that "somebody should choke" the Chief. (A. 4-5, 35).

Following this confrontation, Gummo was charged pursuant to New York State Civil Service Law ("CSL") §75 with conduct unbecoming an officer of the Department, disobedience of an order, and insubordination toward a superior officer. The Village Board held a hearing pursuant CSL §75 and found Gummo guilty of misconduct and insubordination. Gummo received a thirty (30) day suspension without pay, which was not appealed. (A. 5, 35).

The second disciplinary action taken by the Village resulted in Gummo's termination, and relates to his conduct on June 8 and 27, 1989.

On June 8, 1989, Chief Maccarone denied a request made by Gummo on the previous day to have the June 8th night shift off for military leave, because Gummo had not submitted a military order to verify the need for such leave, as required by the Department's longstanding policy. The Chief advised Gummo on the morning of June 8th that he could either obtain such an order or switch shifts with another officer. (A. 5, 35-36).

Later on June 8, 1989, Gummo advised Chief Maccarone that the military had informed him that the requested notice was in the mail. Based on this representation, Chief Maccarone departed from the written military order requirement and told Officer Gummo that he did not have to report for duty at 11:00 p.m. that night. (A. 5-6, 36).

Chief Maccarone never received official orders or any other document from the United States Air Force substantiating Gummo's claim he needed to have the June 8th, 1989 shift off. When Gummo returned to duty following his two week military leave, the Chief met with him on June 27, 1989 to ascertain why the military orders had not been forwarded. Gummo acknowledged that neither a letter nor military orders referencing the need for leave on June 8th, 1989 had been sent to the Chief. Gummo then repeatedly refused to answer questions put to him by his commanding officer. With Gummo's knowledge, this meeting was tape recorded. (A. 6-7, 36).

As a result of the events of June 8th and June 27, disciplinary charges were preferred against Gummo relating to his false statements to his commanding officer and his insubordination. Pursuant to CSL §75, the Village Board of Trustees adopted a resolution appointing an impartial Hearing Officer to adjudicate the charges preferred against Gummo. During the two day hearing, both parties were represented by counsel and were given a full opportunity to offer evidence, including the testimony of sworn witnesses, and to cross-examine witnesses. A complete transcript of the hearing was made. (A. 7, 32, 37-38).

The Hearing Officer sustained three of the four charges against Gummo, finding Gummo guilty of making two false statements to the Chief on June 8, 1989, and of disobeying lawful directives from his commanding officer when he refused to answer questions on June 27, 1989. Observing that Gummo had been disciplined for violating the Department's rules on several prior occasions, the Hearing Officer recommended that he should be discharged. On January 31, 1990, the Village Board unanimously voted to adopt the Hearing Officer's Recommendations and terminated Gummo. (A. 7, 31-32, 37).

Gummo appealed his discharge through a New York State Civil Practice Law and Rules Article 78 petition brought before New York State Supreme Court. The Article 78 petition was transferred to the Appellate Division, Fourth Department, pursuant to Civil Practice Law Rules §7804(g). However, Gummo thereafter abandoned the appeal. (A. 7).

II. *Proceedings in the Courts Below*

Gummo commenced the instant suit by Complaint dated March 8, 1993, alleging that his two suspensions and the termination of his employment violated the Veterans' Reemployment Rights Act, 38 U.S.C. §2021 *et seq.*, with subject matter jurisdiction predicated upon 38 U.S.C. §2022. After a period of discovery, petitioner moved for summary judgment dismissing the complaint on October 4, 1993. Gummo cross-moved for partial summary judgment on October 22, 1993. The motions were submitted for disposition by the District Court on November 5, 1993.

By Memorandum and Order dated April 28, 1995, the District Court granted the petitioner's summary judgment motion to dismiss the complaint and denied respondent's cross-motion for partial summary judgment, both pursuant to the Federal Rules of Civil Procedure 56. (A. 33).

Plaintiff appealed from the decision to the United States Court of Appeals for the Second Circuit. The majority of the three member panel vacated the judgment of the District Court, remanding for further proceedings.

The majority quoted this Court's interpretation of the language of the relevant statutory provision, 38 U.S.C. §2021(b)(3), as having "the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotions, motivated solely by reserve status." (A. 14, *quoting*, *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981)). However, the majority expressly rejected the *Monroe* sole-motivation test, and instead retroactively applied the "but-for" mixed-motive and burden shifting language enacted in the Uniformed Services Employment and

Reemployment Rights Act of 1994, ["USERRA"], 38 U.S.C. §4311(b). (A. 17-18).

Senior District Judge Milton Pollack, sitting by designation, dissented in an opinion which extensively cited this Court's decision in *Rivers v. Roadway Express, Inc.*, 14 S.Ct. 1510, 1519 (1994). Criticizing the majority's decision, Judge Pollack noted this Court's requirement that the text of a statute contain a "clear expression of congressional intent to reach cases that arose before its enactment" in order to permit retroactive application. (A. 30, *citing, Rivers,* 114 S.Ct. at 1516).

Accordingly, Judge Pollack concluded that this Court's "sole motivation" test, as set forth in *Monroe v. Standard Oil Co.*, 452 U.S. at 559, remains the applicable standard for causes of action accruing prior to the enactment of USERRA:

> Congress's failure unequivocally to state that USERRA applies to cases brought before the law's effective date signifies that a "sole motivation" test should be applied to cases, such as the present one, which were brought prior to October 13, 1994. (A. 30).

By Order dated February 13, 1996 the Second Circuit granted petitioner's motion to stay issuance of mandate pending the filing of the instant writ.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Retroactive Application of USERRA Conflicts with the "Clear Statement" Rule Recently Reaffirmed by this Court in *Rivers v. Roadway Express, Inc.* and *Landgraf v. USI Film Products.*

This Court has held that the statutory authority under which Gummo sought relief, 38 U.S.C. §2021, *et seq.*, was enacted "for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotions, motivated solely by reserve status." *Monroe v. Standard Oil Company,* 452 U.S. 549, 558 (1981).

Following *Monroe,* the federal courts have uniformly applied the "sole-motivation" standard in holding that summary judgment is an appropriate means of resolving a suit brought under the Act. The courts have held that even if the employee's military status has played some role in the adverse employment decision, summary judgment in favor of the employer is warranted where the employer can point to a sufficient, non-pretextual reason for discharge irrelevant to the employee's military status.[1]

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[1] *See, e.g., Burkart v. Post-Browning, Inc.,* 859 F.2d 1245 (6th Cir. 1988); *Clayton v. Blachowske Truck Lines,* 640 F.Supp. 172 (D.Minn. 1986), *aff'd,* 815 F.2d 1203 (8th Cir. 1987); *Sawyer v. Swift & Company,* 836 F.2d 1257 (10th Cir. 1988); *Britt v. Georgia Power and Light,* 677 F.Supp. 1169 (N.D.Ga. 1987).

Therefore, to satisfy the *Monroe* test, police officer Gummo was required to point to evidence that would have permitted the court below to find that his discharge was not motivated by his insubordination, acting in a manner which was unbecoming an officer, and lying to the police department's commanding officer, but rather was solely because he was a reservist. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986).

Applying the *Monroe* sole-motivation standard, the District Court granted summary judgment in favor of the petitioner, finding the record was "replete" with evidence of Gummo's refusal to obey orders, insubordination, and failure to comply with Department policies. (A. 38).

The Second Circuit vacated and remanded, concluding that the District Court "should not have employed the sole motivation test employed by *Monroe* and its progeny." The Second Circuit held the District Court should have instead applied the "existing language" of the Uniformed Services Employment and Reemployment Rights Act [hereinafter "USERRA"], which became effective on October 13, 1994, long after this case arose. Relying on the 1994 legislative history of USERRA, the Second Circuit held the so-called "but-for" test should govern with respect to whether Gummo's 1989 discharge was unlawfully discriminatory. (A. 19).

The question of the retroactive application of an employment discrimination statute which was amended in response to a U.S. Supreme Court decision was precisely the issue resolved by the Supreme Court in the recent cases of *Rivers v. Roadway Express,* Inc., ___ U.S.___, 115 S.Ct.

1510 (1994) and *Landgraf v. USI Film Products*, ___U.S.___, 114 S.Ct. 1483 (1994).

In *Rivers*, the district court dismissed the plaintiffs' discriminatory discharge claims, relying upon the U.S. Supreme Court's holding in *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989). While the appeal in *Rivers* was pending, the Civil Rights Act of 1991 became law. The Sixth Circuit ruled that 42 U.S.C. §1981 as interpreted in *Patterson*, not as amended by §101 of the Civil Rights Act of 1991, governed the case. This Court affirmed, ruling that §101 does not apply to a case that arose before it was enacted. *Rivers*, 115 S.Ct. at 1514.

The Court held in *Rivers* that in order to defeat the customary presumption against retroactive application of a statute, the "clear expression" of congressional intent to reach cases that arose before the act's enactment must appear in the statute. *Rivers*, 114 S.Ct. at 1516, 1519.

In the instant case, the Second Circuit did not rely upon any clear expression of congressional intent in the text of USERRA in ruling that the "but-for" test should govern with respect to whether Gummo's 1989 discharge was unlawfully discriminatory. Rather, the Second Circuit adopted the argument that the 1994 legislative history of USERRA suffices to indicate that Congress was merely enacting the new language of §4311(b) as a "reaffirmation" of the original intent of Congress in 1968.[2]

As quoted by the Second Circuit, the legislative history

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[2] Appendix at pp. 17-18, *quoting*, H.R.Rep.No. 65, 103d Cong., 2d Sess. 18, 24, *reprinted in* 1994 USCCAN at 2449, 2457.

of USERRA states that the courts which have followed the *Monroe* standard rather than the "but-for" standard "have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis."[3]

The Second Circuit acknowledged that the text of the 1994 Act provides that amendments made by the Act "that are necessary for the implementation of such section 4311 shall become effective on the date of enactment of this Act." (A. 18, *quoting,* Pub.L.No. 103-353 §8(b)). However, relying upon legislative history indicating that §4311(b) is merely a "codification" of existing law, the Second Circuit held that the "but-for" test introduced in the 1994 Act is applicable to cases arising prior to the enactment date.[4]

In *Rivers,* this Court considered and rejected the same rationale adopted here by the Second Circuit. The *Rivers* petitioners contended that the legislative history of the Civil Rights Act of 1991 indicated that Congress specifically intended to retroactively "restore" prior law which this Court had misinterpreted. The *Rivers* petitioners contended there is a presumption in favor of the retroactive application of such restorative statutes, and pointed to evidence in the

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[3] Appendix at p. 16, *quoting,* H.R.Rep.No.65, 103d Cong., 2d Sess. at 24, 1994 USCCAN at 2457. Petitioner's research indicates that every court which has acknowledged the U.S. Supreme Court's *Monroe v. Standard Oil* decision has adhered to the "sole motivation" test. *Monroe* has been cited in almost 200 opinions, and no court considering *Monroe* has ever questioned its holding that the adverse employment action taken against an employee must be "solely motivated" by reservist status to warrant redress under the Act.

[4] Appendix at p. 18, *quoting,* Joint Explanatory Statement on H.R. 995, 140 Cong.Rec.H. 9136 (daily ed. Sept. 13, 1994), *reprinted in* 1994 USCCAN 2493, 2515.

legislative history of the Civil Rights Act of 1991 as indicating the legislators' view that a "previously established understanding" of 42 U.S.C §1981 had been narrowed by this Court's decision in *Patterson v. McLean Credit Union, supra*. *Rivers,* 114 S.Ct. at 1515-16.

However, this Court made it clear in *Rivers* that there is no presumption in favor of retroactive application of restorative statutes. Holding that "clear evidence" of Congress's retroactive intent is required to impose even a genuinely restorative statute retroactively, the Court observed that "Section 101, and the statute of which it is a part, does not contain such evidence." 114 S.Ct. at 1518. Further, the petitioners' reliance on legislative history was unavailing:

> We may assume, as petitioners argue, that §101 reflects congressional disapproval of *Patterson's* interpretation of §1981. We may even assume that many or even most legislators believed that *Patterson* was not only incorrectly decided but also represented a departure from the previously prevailing understanding of the reach of §1981. Those assumptions would readily explain why Congress might have wanted to legislate retroactively, thereby providing relief for the persons it believed had been wrongfully denied a §1981 remedy. *Even on those assumptions, however, we cannot find in the 1991 Act any clear expression of congressional intent to reach cases that arose before its enactment . . . . [T]he text of the Act does not support the argument that §101 of the 1991 Act was intended to "restore" prior understandings of §1981 as to cases arising before the 1991 Act's passage.* *Rivers,* 114 S.Ct. at 1516 *(emphasis added).*

The petitioner herein submits that the majority of the Second Circuit panel in the instant case erred in its reliance upon the expressions of retroactive intent in the 1994 congressional committee reports, since Congress failed to clearly manifest any intent to retroactively overturn *Monroe* within the statute. As Justice Scalia noted in his concurrence in *Landgraf v. USI Film Products* and *Rivers v. Roadway Express,* ___ U.S.___, 114 S.Ct. 1522 (1994), Congress must provide a "clear statement" in the text of the statute sufficient to defeat the presumption against retroactivity:

> No legislative history can do that, of course, but only the text of the statute itself. That has been the meaning of the "clear statement" retroactivity rule from the earliest times. 114 S.Ct. at 1522, *citing, United States v. Heth,* 3 Cranch 399, 408, 414 (1806); *Murray v. Gibson,* 15 How. 421, 423 (1854) *Schwab v. Doyle,* 258 U.S. 529, 537 (1922); *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 842-844 (1990) (concurring opinion) (collecting cases applying the clear statement test).

Simply stated, the text of USERRA does not support the argument that §4311(b) should be granted retroactive application to cases pending on appeal at the time of the USERRA's enactment.

It bears emphasis that as its *only* statutory basis for its retroactive application of 38 U.S.C. §4311(b), the majority quoted Pub.L.No. 103-353 §8(b), lending emphasis as follows:

> The provisions of section 4311 of title 38, United States Code, as provided in the amendments made

> by this Act . . . *that are necessary for the implementation* of such section 4311 shall become effective on the date of enactment of this Act.

Conceding that "this provision is perhaps susceptible to differing interpretations," the panel majority relied upon legislative reports in concluding that Congress must not have regarded the "linguistic change" it enacted in 38 U.S.C. §4311(b) as an amendment that is "necessary for the implementation of such section 4311." Thus, according to the majority, the "but-for" standard introduced in §4311 is not an addition to the Act, but a "codification of existing law." (A. 18, *quoting,* Joint Explanatory Statement on H.R. 995, *supra).*

As the panel's majority recognized, its interpretation of Pub.L.No. 103-353 §8(b) is vulnerable on a number of grounds. As a threshold matter, it can hardly be maintained that a statutory "codification" which establishes a new standard of conduct is not an amendment which is necessary for the implementation of the Act. Obviously, the Act could not even arguably reach the instant case and provide redress unless the new "but for" standard set forth in §4311(b) is implemented rather than the "sole motivation" standard established by this Court in *Monroe*.

This Court's decisions in *Rivers* and *Landgraf* make it amply clear that since §4311(b) establishes a "new standard of conduct," the important new legal obligations the provision imposes "bring it within the class of laws that are presumptively prospective." *Rivers,* 114 S.Ct. at 1515, *citing, Landgraf. See, Landgraf,* 114 S.Ct. at 1505.

As cogently explained by panel member Judge Pollack in his dissenting opinion, the statutory language relied upon by the panel majority certainly does not provide any clear indication of intended retroactive application, as required by this Court in *Rivers*. (A. 28). The majority makes the insupportable assumption that since Pub.L.No. 103-353 §8(b) can be construed to exclude the new "but-for" test set forth in §4311(b) as an amendment "necessary for the implementation" of §4311, the "but-for" test must be effective not on the date of enactment, but at some earlier date. Such statutory construction by "negative inference" ignores this Court's admonition that "prospectivity remains the appropriate default rule." *Landgraf,* 114 S.Ct. at 1501.[5]

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[5] As pointed out by Judge Pollack, the only other direct reference to the effective date of USERRA contained in the statute confirms that prospective application of USERRA was intended by the Congress. (A. 28-29, FN 3). Section 8 of Pub.L.No. 103-353, entitled "Transition Rules and Effective Dates" provides under subsection (a) in pertinent part as follows:

> (2) The provisions of chapter 43 of title 38, United States Code, in effect on the day before such date of enactment, shall continue to apply to reemployments initiated before the end of such 60-day period [beginning on the date of enactment].

See, Pub.L.No. 103-353, §8(a). This section, ignored by the panel majority, belies the panel's "negative inference" construction. The majority implicitly assumes that since the "but-for" test was not specifically made effective on the Act's enactment date by Pub.L.No. 103-353 §(8)(b), the "but-for" test must be effective at some *earlier* date. However, the Transition Rules and Effective Dates quoted above clearly provide that the former statute will continue to govern reemployments until a specified *future* date. *Compare, Rivers,* 114 S.Ct. at 1514; *Landgraf,* 114 S.Ct. at 1493-95) (rejecting "negative inference" arguments invoked under canon of *expressio unius est exclusio alterus* as sufficient to decide retroactivity issue).

Further, as discussed by Judge Pollack in his dissent, even the legislative history relied upon by the majority is ambiguous, inasmuch as it fails to indicate whether the new standard applies to cases "brought" under "this section" in the future, or also to cases which "have been brought" in the past. The reference to "this section" is also unclear, since the prior version of §4311 contained significantly different language. (A. 28-29).

The Second Circuit's ruling entirely relies on the foregoing ambiguous legislative history and one provision of the statute which the majority concedes is "susceptible to differing interpretations." (A. 18). In absence of any clear statement of retroactive intent in the Act, the Second Circuit has retroactively applied a new "but-for" standard which imposes significant new liabilities and legal obligations. The conclusion of this Court's opinion in *Rivers* leaves no doubt that the Second Circuit's ruling is directly contrary to the "clear statement" rule:

> A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction . . . . Congress, of course, has the power to amend a statute that it believes we have misconstrued . . . . No such change, however, has the force of law unless it is implemented through legislation. Even when Congress intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the "corrective" amendment must clearly appear. *Rivers*, 115 S.Ct. 1519.

Inasmuch as the Supreme Court provided the authoritative construction of 38 U.S.C. §2021 in *Monroe v. Standard Oil, supra,* Congress could only have retroactively superseded the Supreme Court's ruling through clear legislation sufficient to defeat the presumption against the retroactive application of the statute. Accordingly, the writ should be granted since the Second Circuit's retroactive application of USERRA is in stark conflict with the applicable decisions of this Court.

II. The Issues Decided by the Panel are of National Importance, Inasmuch as They Involve The Interpretation of Recent Amendments to Federal Veteran and Military Reservist Rights Legislation

In deciding the standard and burden of proof applicable under §4311(b), the Second Circuit decided an important question of federal law which has not been, but should be, decided by this Court.

The Second Circuit held that proper analysis of a summary judgment motion under §4311(b) requires a determination of the following two factors:

> (a) whether there was sufficient evidence from which a rational jury could infer that [the plaintiff's] status or conduct as a reservist was a substantial or motivating factor in his dismissal; and

> (b) if there was such evidence, whether it could be said as a matter of law that the [employer] would have discharged him even if he had not been a reservist. (A. 19).

In the instant case, the Second Circuit has decided that even where an employer offers uncontroverted proof that the employee would have been discharged due to misconduct even if he had not been a reservist, the employee's claim under §4311(b) is insulated from summary dismissal so long as the misconduct was even remotely related to his reservist obligations.

Here, Gummo claims that after twelve years of employment with the Village of Depew Police Department, he was discharged on January 31, 1990 because of his Air Force Reserve status. The record, however, conclusively establishes that Gummo was not discharged until he was found guilty by an impartial Hearing Officer of committing various acts of misconduct, including insubordination and lying to his commanding officer. At the two day hearing, conducted pursuant to New York Civil Service Law Article 75, Gummo was represented by counsel and was afforded a full opportunity to offer evidence, including the testimony of sworn witnesses, and to cross-examine petitioner's sworn witnesses.

Gummo has himself testified that he yelled at his commanding officer, walked out of the meeting with the Chief without being dismissed, and said in the presence of other Department employees that somebody should "choke" the Chief. The charges against Gummo for lying to the Chief and for insubordination were fully and conclusively adjudicated in the CSL §75 hearing. There is no genuine

issue of fact regarding Gummo's misconduct. Further, there is a complete absence of any evidence that the impartial Hearing Officer who recommended the penalty of discharge and the Village Board which adopted that recommendation were motivated by Gummo's reservist status in any respect whatsoever. (A. 38).

Petitioner submits that since the Village has pointed to an absence of evidence necessary to support the nonmoving party's claim that his reservist status was a *motivating* factor in the Village's decision to discharge him, summary judgment was entirely appropriate in the instant case. *See, e.g., Celotex Corp. v. Catrett, supra,* 477 U.S. at 322-23.

Rather than dispute the factual findings of the Hearing Officer, Gummo claims his acts did not constitute misconduct because they were related to his reservist activities. (A. 38). According to Gummo's sworn testimony, reproduced in the record below, the charge that he was insubordinate when he refused to answer the Chief's questions about his prior conduct discriminates against him as a reservist "[p]robably because the events were related to reserves, it was reserve activity." Regarding the charge that he falsely represented that orders were being forwarded, Gummo supported his claim that he was discriminated against because of his reservist status "[b]ecause [lying to the Chief] never could have been charged if I wasn't in the military because it's based around my reserve commitment with the military."

This claim is deficient on its face because it overlooks the fact that being a reservist did not in any way require that Officer Gummo be verbally abusive and refuse to respond to direct questions from his commanding officer, nor did reservist status exempt Gummo from longstanding

Department policy forbidding absence from duty without proper authorization, irrespective of reason.

The immaterial defenses asserted by Gummo do not contravene the salient and uncontroverted fact that Gummo's discharge was for sufficient cause, upon the recommendation of an impartial Hearing Officer. Accordingly, petitioner submits there is an absence of evidence to support an essential element which should be required in order to state a *prima facie* case under the Act: Gummo cannot show that he was discharged *because* of his military reservist status, whether as the sole cause or merely a contributing cause, since Gummo indisputably would have been discharged for the acts of insubordination and lying to his commanding officer even if he had not been a reservist.

Case after case has held that the employee is not insulated from discharge merely because the conduct was "related" or "based around" reservist status, to use the words chosen by Gummo. For example, in *Burkart v. Post-Browning, Inc.*, 859 F.2d 1246 (6th Cir. 1988), the Sixth Circuit dismissed the employee's theory that he was insulated from discharge because his dereliction was occasioned by his association with the National Guard:

> [I]t is not the employee's ties with the armed services which led to his discharge. Rather, the cause of the employee's discharge is his own intentional failure to act responsibly in reporting and informing the employer of his future obligations, regardless of whether these obligations were related to military duty or some other personal need.

Burkart v. Post-Browning, Inc., supra, 859 F.2d at 1248. As veterans' and reservists' rights legislation has historically been understood, the fact that an employee's discharge for cause is tangentially related to his military obligation does not preclude judgment as a matter of law for the employer.[6]

Thus, the Second Circuit's interpretation of the burden and standard under the 1994 Act is a critical decision on an important issue of federal law. The standard as interpreted by the Second Circuit precludes summary judgment to the employer on the ground that the employee's misconduct is merely related to reservist status, rather than because the employee has pointed to some colorable evidence which indicates that his reservist membership or obligation was a motivating factor in the employer's decision to discharge him.

Petitioner maintains the District Court properly held that Gummo's status as a military reservist, without more, is not

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[6] *See, Britt v. Georgia Power and Light*, 677 F.Supp. 1169, 1172 (N.D.Ga. 1987) (Even assuming truth of allegations that employee expected harassment and therefore refused to attend a meeting with management to discuss his complaints about the company's failure to accommodate his reservist obligations, employee's "decision to defy the direct orders of his superiors was an independent and significant reason for discharge"); *Henry v. Anderson*, 522 F.Supp. 1112, 1115 (E.D. Tenn. N.D. 1981) (reservists' rights legislation does not require court to disregard those aspects of employment relationship which would make continued employment unreasonable); *McCormick v. Carnett-Partsnett Systems, Inc.*, 396 F.Supp. 251, 256 (M.D.Fla. 1975) (criticizing plaintiff's apparent assumption that his armed forces status was "a guarantee that any behavior on the job must be tolerated"); *Blackmon v. Observer Transportation Co.*, 102 Lab.Cas. (CCH) ¶ 11, 450 at 23,913 (W.D.N.C., Oct. 28, 1982) (employee was discharged "not because of military service obligations, but because of his failure to request a leave of absence from his employer").

sufficient to defeat defendant's motion for summary judgment.[7]

It is respectfully submitted that the Second Circuit's decision on the important federal question of the standard and burden which shall apply in USERRA cases improperly disregards the clear requirement of discriminatory motivation set forth in the Act. Gummo was discharged by the Village Board, upon the recommendation of the impartial Hearing Officer, because he was found guilty of insubordination and lying to the Chief of Police. That the Board and the Hearing Officer acted without discriminatory motivation against military reservists has never been in dispute. (A. 38).

Since this case presents the clear issue of whether USERRA should be construed to insulate reservists from disciplinary action where reserve membership is not a determinative factor in the employer's action, *certiorari* should be granted to so that this Court may decide this important question of federal law.

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[7] Notably, every other police officer in the Department who elected to serve in the Guard and Reserves managed to do so without encountering discrimination, as was attested to in the sworn affidavits of police officers Gorski, Moore, and Ziemba in the record below. All three officers received their appointments to the Department while members of the National Guard and Reserves. Chief Maccarone promoted Moore three times, and promoted Gorski from patrolman to lieutenant, during the period of Gummo's employment and while both Gorski and Moore were reservists. Even Gummo has stated he cannot recall and does not know of any discriminatory treatment encountered by these officers. *See, e.g., Sawyer v. Swift & Company*, 836 F.2d 1257, 1262 (10th Cir. 1988) (reversing grant of summary judgment to employee who claimed his discharge was due to his absence due to reserve obligations, where other employee-reservists were given time off with no problems).

CONCLUSION

For the reasons stated above, a writ of *certiorari* should issue to review the order and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX A

Decision of the United States Court of Appeals for the Second Circuit, Decided January 19, 1996.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 578—August Term, 1995

(Argued: November 9, 1995

Decided: January 19, 1996)

Docket No. 95-7551

WILLIAM M. GUMMO,

Plaintiff-Appellant,

—v.—

VILLAGE OF DEPEW, NEW YORK,

Defendant-Appellee.

Before:

KEARSE and WINTER, *Circuit Judges*, and POLLACK, *District Judge.**

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* Honorable Milton Pollack, of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from judgment of the United States District Court for the Western District of New York, John T. Elfvin, *Judge*, summarily dismissing complaint alleging discrimination on the basis of membership in United States military reserves, *see* 38 U.S.C. § 2021 et seq. (1988); *id.* § 4301 et seq. (1994).

Vacated and remanded.

Judge Pollack dissents in a separate opinion.

GLENN EDWARD MURRAY, Buffalo, New York (Murray & Coleman, Buffalo, New York, on the brief), *for Plaintiff-Appellant.*

PAUL D. WEISS, Buffalo, New York (Weiss & Stein, Buffalo, New York, on the brief), *for Defendant-Appellee.*

KEARSE, *Circuit Judge*:

Plaintiff William M. Gummo, a member of the United States Air Force Reserves formerly employed by the Police Department of defendant Village of Depew, New York ("Village"), appeals from a judgment of the United States District Court for the Western District of New York, John T. Elfvin, *Judge*, dismissing his complaint alleging that the Village terminated his employment in violation of the Veterans' Reemployment Rights Act, 38 U.S.C. § 2021 et seq. (1988) (current version at 38

U.S.C. § 4301 et seq. (1994)) (the "Act" or "VRR Act"). The district court granted the Village's motion for summary judgment on the ground that Gummo could not show that his termination was motivated solely by, or had any causal relationship to, his reserve status. On appeal, Gummo contends principally that summary judgment dismissing his complaint was improper because the district court erred in applying the sole-motivation test and because there were genuine issues to be tried with respect to causation. He also contends that he was entitled to a partial summary judgment in his favor ruling that the Department's policy of refusing to grant military leave without the submission of written official orders violated § 2024(d) of the Act. For the reasons that follow, we agree that the district court erred in granting summary judgment, and we therefore vacate the judgment and remand for further proceedings.

I. BACKGROUND

Except to the extent indicated, most of the background events do not appear to be in dispute.

A. *Gummo's Employment With the Police Department*

From 1977 until his discharge in January 1990, Gummo was employed as a police officer by the Depew Police Department. In December 1986, he enlisted in the United States Air Force Reserves ("Reserves") and was assigned to military duties at the Air Force base in Niagara Falls, New York, some 30 miles from Depew. Gummo's military obligations required him to participate in training sessions one weekend each month at the Air Force base and to attend a two-week tour of training each year ("annual tour") at a site designated by the Air

Force. As a municipal employee, Gummo was entitled under state law to be paid his salary during any less-than-30-day absence for military training. *See* N.Y. Military Law § 242(5) (McKinney 1990).

The Depew Police Department's policy was to grant requests for paid military leave when reservists presented to the Department their official written orders specifying the dates of their military training. Until October 1988, Gummo complied with that policy. In that month, Gummo submitted a handwritten note indicating his weekend military training dates for November and December 1988. Police Captain James A. Brennan instructed Gummo to submit his official written military orders for all of fiscal 1988-1989. Gummo promptly complied in part, submitting orders for his weekend tours but not for his annual tour. On December 25, he notified Brennan that his next annual tour was scheduled for June 10-24, 1989, but he did not submit official written military orders at that time.

In January 1989, Gummo was instructed to meet with Police Chief John T. Maccarone to discuss Gummo's failure to provide the Department with the official orders for his annual tour. The parties have different views as to what occurred at the meeting. Gummo asserts that Maccarone questioned him about his military leave and that Maccarone cursed at him, called him a liar, a sneak, and a disgrace to the uniform, and twice threatened to "get" him. The Village asserts that at the meeting, Gummo yelled and screamed at Maccarone without restraint and became threatening. In any event, there appears to be no dispute that the meeting was rancorous, that Gummo left the meeting peremptorily without having been dismissed, and that as he was leaving he said, in the presence of other Police Department employees, "Somebody

should choke that man." As a result of this incident, Gummo was charged with several counts of misconduct, including conduct unbecoming a police officer, disobedience of an order, and insubordination to a superior officer. He was found guilty on most counts and was suspended for 30 days without pay.

In May 1989, Gummo notified Captain Brennan in writing that the start of his annual tour had been rescheduled from June 10 to June 9. Gummo attached his official written military orders, which authorized him to receive 16 days of leave for military duty (June 9-24), as well as one day of leave for travel to the Air Force base. The orders stated that he was to report at the Air Force base on June 9 at 7:30 a.m.

Gummo was scheduled, however, to work the night shift on June 8, starting at 11:00 p.m. and ending at 7:00 a.m. on June 9 (the "June 8-9 night-shift"), *i.e.*, a shift ending 30 minutes before the start of his annual tour at the Air Force base. On June 7, 1989, he submitted to Captain Brennan a written request for military leave from that shift in order to have time to prepare for and travel to the annual training session. The request was initially denied by Maccarone on the ground Gummo had not submitted military orders with his request.

On June 8, Gummo renewed his request to be relieved of the June 8-9 night-shift assignment; Maccarone advised Gummo that he could either trade shifts with another officer or obtain official written military orders indicating that he should be relieved of his assignment to the June 8-9 night-shift. On the afternoon of June 8, Gummo informed Maccarone that official notice from the Air Force concerning his military leave for that evening would be mailed to the Police Department. The

Village states that Gummo said the official "orders" would be sent; Gummo asserts that he said a "letter" would be sent. Based on his June 8 conversation with Gummo, Maccarone instructed Captain Brennan to remove Gummo's name from the June 8 duty roster and informed Gummo that he would be granted the additional day of military leave.

Gummo asserts that sometime after 7:00 p.m. on June 8, he learned that the letter he had expected from the Air Force, authorizing military leave for that night's shift, would not be forthcoming. Gummo therefore reported for work at the Department at 11:00 p.m. on June 8. He worked until 3:00 a.m. on June 9, and was then driven home by the police lieutenant on duty. He went to the Air Force base at Niagara Falls to begin his annual tour of military duty a few hours later.

When Gummo returned to work following the completion of his annual tour, Maccarone summoned him to discuss the Department's nonreceipt of the written authorization Gummo had promised with respect to Gummo's June 8 military leave. When asked about his statement that written "orders" supporting the June 8 military leave had been mailed to the Department, Gummo stated that he had said a "letter" would be sent to the Police Department, having been told by an Air Force base secretary, whom he identified by her first name, that a letter would be sent. Gummo refused to reveal the name of the person who had thereafter informed him that no such letter would be sent on June 8, despite being ordered by Maccarone to do so, insisting that that information was irrelevant. Several times during the meeting, Gummo asked to be allowed to have counsel or a nearby union representative present to assist him before answering further questions, but Maccarone

denied his requests. After responding to a series of questions about his eventual decision to report for work on June 8, Gummo declined to make any further statements unless he was permitted to have someone there to assist him.

Following that meeting, Gummo was charged with four counts of violating Police Department regulations, and in July 1989 he was suspended from the Department pending the resolution of the disciplinary charges. The Village appointed an impartial hearing officer to conduct an administrative proceeding. After a two-day hearing, the officer dismissed one of the charges, but found Gummo guilty of the other three, to wit, falsely advising the police chief that military orders were in the mail; disobeying a lawful order by refusing to answer questions relating to the events of June 8, 1989; and falsely stating to Maccarone that he had never claimed that military "orders" were being sent to the Department. In light of the finding of guilt and of Gummo's prior disciplinary record, the hearing officer recommended that Gummo be dismissed from the Police Department.

The Village accepted the recommendation and, in January 1990, terminated Gummo's employment with the Department. Gummo initiated a state-court challenge to his discharge but did not perfect that challenge.

B. *The Proceedings in the District Court*

Gummo commenced the present suit in March 1993, alleging that his two suspensions and the termination of his employment violated the VRR Act because those actions were motivated by his "status and duty as a member of the armed forces." (Complaint ¶ 23.) He principally sought reinstatement and compensation for lost

wages and other lost benefits. After a period of discovery, the Village moved for summary judgment dismissing the complaint. In support of its motion, the Village submitted, *inter alia*, the affidavit of Maccarone, the depositions of Maccarone and Gummo, and affidavits of three other Depew police officers who were or had been reservists and who stated that they had never been subjected to discrimination by the Department on that basis. The Village took the position that it had terminated Gummo's employment only because of his insubordination and other misconduct and not because of his reserve status.

Gummo opposed summary judgment. In Maccarone's deposition, Gummo had elicited testimony as to Maccarone's views with regard to the statutory benefits accorded to reservists. For example, Gummo brought out that some years earlier David Gorski, one of the police-officer reservists who submitted an affidavit in the present case stating that he had never been discriminated against on the basis of his reserve status, had once complained to the United States Department of Labor about the Police Department's treatment of him as a reservist:

> Q. Did you . . . ever complain to the Department of Labor about any reservists or laws that govern reservists?
>
> A. I didn't complain to the Department of Labor. Lieutenant Gorski complained to the Department of Labor and as a result, they did an investigation.

(Deposition of John T. Maccarone ("Maccarone Dep.") at 36.) Maccarone testified that in the wake of Gorski's complaint, a Department of Labor official, Frank Curry,

had come to see him and that the gist of their conversation was as follows:

> I'm quoting him. "You can't touch [Gorski]. They can do what they want. They can tell you. They don't have to give you a written order on anything. If they want the day off before, they can do it. If they want the day off after, they can take it, you have to accept it." I said, "You're out of your mind."

(Maccarone Dep. at 39.) The Department of Labor, as a result of its investigation, found that, with the exception of one conceded misdeed, Gorski had done "absolutely nothing wrong" with regard to his reservist status and requests. (*Id.* at 36.) Maccarone apparently disagreed:

> Q. Were you—did you agree with the—did you agree with the outcome of the Department of Labor investigation?
>
> A. No, I did not.
>
> Q. Why?
>
> A. It was obvious from the minute that Mr. Frank Curry walked in my office that he was not an impartial investigator, that his sole purpose in life was to protect the reservist.
>
> Q. And that bothered you?
>
> A. Tremendously.
>
> Q. And did you express any unhappiness toward Mr. Curry?
>
> A. I ordered him out of my office.

(Maccarone Dep. at 37-38.)

Maccarone testified that he generally believed that, though most municipalities could afford the expense, reservists should not receive their full municipal salaries while they were on paid reserve duty. (*Id.* at 33.) He had sent a municipal official a letter (*id.* at 32), which was quoted in a local newspaper, seeking legislation against what he had referred to as " 'double dipping in its most flagrant form.' " *The Depew Lancaster Metro Community News* at 3D (Jan. 22, 1989) (quoting Maccarone letter).

With respect to the events at issue in the present action, Maccarone indicated that Gummo had been denied a promotion, and Maccarone stated his view that Gummo was attempting to force the Department to adhere to "the military law right by the letter of the law" as a means of retaliation for the denial:

> A. . . . . Mr. Gummo was not a problem with his reserve status from the day he signed up until the day he discovered he was not going to be successful lieutenant candidate. Then he started a course of action that turned him completely around.
>
> . . . .
>
> Q. What is it—what kind of—after that day forward, did Mr. Gummo abuse his rights as a reservist?
>
> . . . .
>
> THE WITNESS: I don't know if you'd call it his abuse of his rights, his reservist status. I would call it an abuse of the departmental status. What he was doing was he was attempting to use his official military status as a weapon to retaliate and get even with myself and the department.

. . . .

Q. . . . . And how was it —

A. And he was doing things like writing—do these things like writing [a certain] letter to the editor.

Q. But the letter had nothing to do with his military status?

A. That's right. But these are the things he started doing. And then he started doing things with his schedule. He wouldn't be up front as he was in the past about producing his weekend schedule. He wouldn't be up front about producing his two-week tour schedule. He was just being everything—doing everything to be obstinate to show that he didn't have to cooperate. And he started calling the military law right by the letter of the law. "I don't have to give you this and I don't have to give you that."

(Maccarone Dep. at 74-76.) Maccarone stated that this "bother[ed]" him because "I'm his employer. He has another obligation through his employment . . . ." (*Id.* at 76.)

In his own deposition, Gummo had testified to his version of the January 1989 meeting with Maccarone, stating that Maccarone had accused him of lying about his military leave and had promised to "get" him, which Gummo interpreted as meaning that Maccarone meant to retaliate for Gummo's insistence on his rights under the VRR Act. (Gummo Dep. at 187-89.) Thus, in opposition to summary judgment, Gummo contended that the Village's decision to terminate his employment was based on his status as a reservist and that summary judgment could not properly be granted against him. He also cross-

moved for partial summary judgment in his favor, contending that the Department's policy of refusing to grant reservists leave without receiving written military orders was unlawful.

In a Memorandum and Order dated April 28, 1995 ("Opinion"), the district court denied Gummo's motion and granted that of the Village. Stating that the purpose of the Act "is to prohibit employment discrimination against Reservists 'motivated solely by reserve status,' " Opinion at 7 (quoting *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981)), the court concluded that the Act is inapplicable where "a Reservists's employment is terminated for reasons other than his status," Opinion at 7. The court noted that:

> [t]he record is replete with evidence of Gummo's refusal to obey orders, insubordination and failure to comply with the Department's policies. He does not controvert most of this evidence but disputes the characterization of such as "misconduct." Regardless of how these uncontroverted facts are characterized, it was found during the [administrative] proceeding that Gummo was guilty of misconduct such as to constitute good cause for discharge.

Id. Finding that Gummo was collaterally estopped from challenging these administrative findings in a proceeding in federal court, the district court ruled that the Village was entitled to summary judgment because "[a]s a matter of law . . . , Gummo's Reserve status was not the sole reason for his discharge." *Id.* at 8.

The district court further reasoned that even if Gummo could relitigate the findings of misconduct, he had offered no evidence indicating that he had been suspended or discharged because of his reserve activities.

Rather, it found, Gummo's "entire argument rest[ed] on his allegation that the defendant's requirement that written orders be submitted prior to being granted military leave is 'unlawful' . . . . [and] that but for the defendant's policy, he would never have gotten into the arguments with Maccarone that resulted in his discharge." *Id.* The court concluded that Gummo had failed to provide any authority to support his assertion that the Department's policy violated the Act, and that "in the absence of any allegation that the policy was designed to hinder Reservists from participating in their military duties," *id.*, his arguments were insufficient to raise a question of material fact as to the Village's motive for discharging him. Judgment was entered dismissing the action as a matter of law, and this appeal followed.

II. DISCUSSION

On appeal, Gummo contends principally that the sole-motivation test should not have been applied and that there was sufficient evidence to permit a reasonable juror to find a causal link between his membership in the Reserves and his discharge. We agree.

A. *The Motivation Requirement Under the VRR Act*

The VRR Act was enacted in 1968. One of its purposes was to encourage noncareer service in the uniformed services by minimizing the disadvantages to civilian careers and employment that could result from such service. *See* S. Rep. No. 1477, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News ("USCCAN") 3421, 3421-22. It provided, *inter alia*, that an employee "shall upon request be granted a leave of absence by such person's employer for the

period required to perform . . . inactive duty training." 38 U.S.C. § 2024(d) (1988). Prior to 1994, § 2021 of the Act (which was renumbered § 4301 in 1992, and relevant parts of which were renumbered § 4311 in 1994) provided, in pertinent part, that

> [a]ny person who [is employed by the state or a political subdivision thereof] shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

38 U.S.C. § 2021(b)(3) (1988) (renumbered § 4301(b)(3) pursuant to Pub. L. No. 102-568, § 506 (1992); renumbered § 4311 in Pub. L. No. 103-353, § 2 (1994)). In 1981, the "because of any obligation" language of § 2021(b)(3) was interpreted by the Supreme Court as having "the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, motivated solely by reserve status." *Monroe v. Standard Oil Co.*, 452 U.S. at 559. In so stating, the Court relied on the legislative history of that section, including a House of Representatives Committee report which stated that the section

> amplifies existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employees [*sic*] soley [*sic*] because of such Reserve affiliation.

Id. at 558 (quoting H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3 (1968) (brackets in *Monroe*)). In *Monroe*, the Supreme Court had ruled that the VRR Act did not require employers to make work-scheduling accommo-

dations for reservists that were not made for other employees, *i.e.*, to provide a reservist with "a special work-scheduling preference." 452 U.S. at 561. Following *Monroe*, other courts interpreted § 2021(b)(3) as permitting the exoneration of an employer who could point to a nonpretextual reason for an adverse employment decision that was irrelevant to the employee's military status, even if that status played some role in the decision. *See, e.g., Burkart v. Post-Browning, Inc.*, 859 F.2d 1245, 1247 (6th Cir. 1988); *Sawyer v. Swift & Co.*, 836 F.2d 1257, 1262 (10th Cir. 1988); *Clayton v. Blachowske Truck Lines, Inc.*, 640 F. Supp. 172, 174 (D.Minn. 1986), *aff'd*, 815 F.2d 1203 (8th Cir. 1987).

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act ("USERRA") to replace the VRR Act in order to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." H.R. Rep. No. 65, 103d Cong., 2d Sess. 18 (1994) ("House Report" or "Report"), *reprinted in* 1994 USCCAN at 2449, 2451. USERRA was designed to "[c]ontinue to prohibit discrimination or acts of reprisal against an employee . . . because of a past, current, or future military obligation," House Report at 17, 1994 USCCAN at 2450, but it eliminated the "because of" language of § 2021(b)(3), and Congress disavowed the sole-motivation requirement inferred by *Monroe* and its progeny. The language was modified to state that an employer violates the Act if an employee's "membership . . . or obligation for service in the uniformed services is *a* motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership . . . or obligation." 38 U.S.C. § 4311(b) (emphasis added).

The Village argues that the district court properly applied the *Monroe* sole-motivation test in the present case in preference to the existing language of § 4311(b) because USERRA, which became effective on October 13, 1994, long after the events involving Gummo, did not expressly overrule *Monroe*. Given Congress's power to amend a statute to clarify its original intention when the courts have misperceived that intention, and to make such clarifications applicable to cases begun before passage of the clarifying statute, *see generally Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1519 (1994); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987), and given the congressional descriptions of § 4311(b) discussed below, we disagree.

The report of the House of Representatives Committee on Veterans' Affairs accompanying the House bill that eventually became USERRA stated that "the original intent of Congress when it enacted current section 2021(b)(3) of title 38, in 1968" was not the imposition of a sole-motivation test, House Report at 24, 1994 USCCAN at 2457, and that the cases applying the "sole factor" test suggested by *Monroe* had misinterpreted Congress's intent:

> To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. § 2021(b)(3) and are rejected on that basis.

House Report at 24, 1994 USCCAN at 2457. The Report stated that the new language of § 4311(b) was "simply a reaffirmation of the original intent of Congress," House Report at 24, 1994 USCCAN at 2457, "that the standard of proof in a discrimination or retaliation case is the so-called 'but-for' test and that the burden of proof is on the employer, once a prima facie case is established," *id.* The report of the Senate Committee on Veterans' Affairs likewise stated that § 4311's explicit mixed-motive and burden-shifting language simply reflected Congress's original intent:

> New section 4311(b) would provide, *consistent with current law*, that the employer would be considered to have committed a prohibited act of discrimination under the VRR law if the claimant's covered connection with service was *a* motivating factor in the employer's action, *unless the employer showed that the action complained of would have been taken in the absence of service connection. This provision is a reaffirmation of the original intent of Congress when it enacted current section* 4301(b)(3) of title 38 *in 1968*. The Committee intends . . . that the burden of proof with respect to this affirmative defense would be on the employer.

S. Rep. No. 158, 103d Cong., 2d Sess. 45 (1994) ("Senate Report") (emphasis added).

Explicitly rejecting *Monroe*, both congressional reports stated that courts applying § 4311(b) should instead use the scheme of burden-of-proof allocations approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983), for actions under the National Labor Relations Act. House Report at 24, 1994 USCCAN at 2457; Senate

Report at 45. Under that scheme, a claimant carries his burden of proving a prima facie case of discrimination by showing, by a preponderance of the evidence, that his protected status was "a substantial or motivating factor in the adverse [employment] action"; but the employer may nonetheless escape liability by showing, as an affirmative defense, that it would have made the same decision without regard to the employee's protected status. *Transportation Management*, 462 U.S. at 401.

We reject the Village's contention that this analytical scheme was not meant to apply to preexisting cases such as the present case. With respect to § 4311, USERRA states as follows:

> The provisions of section 4311 of title 38, United States Code, as provided in the amendments made by this Act, . . . *that are necessary for the implementation* of such section 4311 shall become effective on the date of enactment of this Act.

Pub. L. No. 103-353, § 8(b) (emphasis added). Though this provision is perhaps susceptible to differing interpretations, the legislative history statements, describing § 4311 as simply a reaffirmation of Congress's original intent in enacting § 2021(b)(3), strongly indicate that Congress did not regard the linguistic change as an amendment that is "necessary for the implementation of such section 4311." This was made more plain by a bicameral report with respect to the effective dates on which USERRA's various provisions were to become effective: it was agreed that "the standard and burden of proof set forth in section 4311(b) are not additions to the Act but are a codification of existing law." Joint Explanatory Statement on H.R. 995, 140 Cong. Rec. H 9136 (daily ed. Sept. 13, 1994), *reprinted in* 1994

USCCAN 2493, 2515. Accordingly, the House Report stated expressly that the *Transportation Management*

> standard and burden of proof is [*sic*] applicable to all cases brought under this section *regardless of the date of accrual of the cause of action.*

House Report at 24, 1994 USCCAN at 2457 (emphasis added).

Given Congress's clear statements as to its original intent in enacting the VRR and its wish to have the courts apply § 4311(b) in accordance with that intent to all cases regardless of their vintage, we conclude that the district court should not have employed the sole-motivation analysis adopted by *Monroe* and its progeny. Proper analysis, in connection with the Village's summary judgment motion, required a determination of (a) whether there was sufficient evidence from which a rational jury could infer that Gummo's status or conduct as a reservist was a substantial or motivating factor in his dismissal; and (b) if there was such evidence, whether it could be said as a matter of law that the Village would have discharged him even if he had not been a reservist.

B. *The Record in the Present Case*

A party moving for summary judgment bears the burden of establishing that there exists no genuine issue of material fact warranting a trial, *see, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), and that the affidavits and depositions, etc., "show that . . . the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c). In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy this burden by

pointing to an absence of evidence to support an essential element of the nonmoving party's claim. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In ruling on such a motion, the district court must view the evidence in the light most favorable to the party opposing summary judgment and must draw all permissible inferences from the submitted affidavits, exhibits, interrogatory answers, and depositions in favor of that party. *See, e.g., Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). If, as to the issue on which summary judgment is sought, there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper. *See, e.g., Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994); *Brady v. Town of Colchester*, 863 F.2d 205, 210-11 (2d Cir. 1988). In determining whether the nonmoving party has presented evidence sufficient to defeat the motion for summary judgment, we review the record *de novo*, drawing all factual inferences and resolving all ambiguities in favor of the nonmoving party. *See, e.g., Goenaga v. March of Dimes Defects Foundation*, 51 F.3d 14, 18-19 (2d Cir. 1995); *Healy v. Rich Products Corp.*, 981 F.2d 68, 72 (2d Cir. 1992); *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849 (1991).

The record in the present case, taken in the light most favorable to Gummo, sufficed to require denial of the Village's motion for summary judgment. First, the evidence permits an inference of hostility on the part of the Department toward reservists *qua* reservists. For example, the Department had previously dealt with another reservist's requests in such a way as to cause the officer to complain to the United States Department of Labor;

and when a representative of that federal agency informed Maccarone that the reservist was entitled to enforce the law, Maccarone told the federal official, " 'You're out of your mind' " (Maccarone Dep. at 39), and ordered the official out of Maccarone's office. In addition, at his deposition, Maccarone stated that the Department could not afford to have more than two or three reservists on its staff (*id.* at 33); that he was "bother[ed]" by Gummo's insistence that the Department obey "the letter of the law" (*id.* at 76); and that he was "not going to let [Gummo] ruin the law enforcement in the Village of Depew by not having enough people on duty" (*id.*). In the same month in which he initially rebuked Gummo with respect to his requests for Reserves leave, and, according to Gummo, threatened to "get" Gummo, Maccarone proceeded to complain to a local official about the special treatment accorded to reservists, requesting legislation to end what Maccarone called "double dipping in its most flagrant form." Though requesting legislation is of course valid conduct, the making and the tone of that request nonetheless confirmed Maccarone's antipathy toward the statutory benefits to which reservists were then entitled. A jury could easily infer from this record an anti-reservist animus on the part of the Department.

Further, with respect to the Department's denial of Gummo's June 7 and June 8 requests that he be relieved of his June 8-9 night-shift assignment, which precipitated the chain of events that led directly to his dismissal, a jury could reasonably question the bona fides of the Village's stated rationale for the denial, *i.e.*, that Gummo's requests were not accompanied by his written orders. Gummo had submitted those written orders to the Department in May. The written orders, which are in the

record, stated that Gummo was to report to the Air Force base at 7:30 a.m. on June 9; they authorized him to receive 16 days of leave for military duty (June 9-24); and they authorized him to receive, in addition, one day of leave for travel to the Air Force base. Since the Department had already received the written orders, the denial of Gummo's June 7 and June 8 requests on the ground that he did not submit written orders seems, at best, peculiar.

At oral argument of this appeal, the panel inquired why the previously submitted orders did not meet the requirement imposed by the Department's policy. No satisfactory response was forthcoming. Counsel for the Village repeatedly responded that the orders set a starting date of June 9 and that Gummo's shift was for June 8. This explanation too seems peculiar in light of the facts that that June 8-9 night-shift was scheduled to end at 7:00 a.m. on June 9, and that the written orders already submitted to the Department stated that Gummo's annual tour was to commence at 7:30 a.m. on June 9 and that he was to be allowed a day of leave for travel.

From the fact that Gummo had already submitted the written orders that the Department continued to demand, from the absence of any plausible explanation as to why that submission did not suffice to satisfy the Department's policy, from the Village's seemingly irrational position that the Department could not fathom that a shift ending at 7:00 a.m. on June 9 did not give Gummo a day for travel to an assignment that was to begin 30 minutes later, and from the many manifestations of the Department's antipathy toward reservists' enforcement of their statutory rights, a jury could reasonably infer that the Department's denial of Gummo's leave request on the ground that it was not accompanied by the written

orders was pretextual, and that that stance and Maccarone's confrontations with Gummo were intended, because of Gummo's insistence on his rights as a reservist, to lead to the termination of his employment.

In sum, we conclude that the evidence in the record, taken in the light most favorable to Gummo, sufficed to establish a prima facie case under § 4311(b) and to preclude a ruling as a matter of law that the Village would have discharged him even if he had not been a reservist. Accordingly, summary judgment dismissing the complaint was inappropriate. We of course express no view as to the likely outcome of the case after a trial.

C. *Gummo's Cross-Motion for Partial Summary Judgment in his Favor*

Gummo also pursues on appeal his contention that he is entitled to partial summary judgment declaring that the Department's policy of not granting leave without the reservist's presentation of written orders violated the VRR Act. In support of this contention, he points to a provision in a United States Department of Labor Handbook. We are not persuaded.

The paragraph on which Gummo relies states as follows:

> The request for leave does not have to be in writing or in any particular form, although a written request may facilitate proof of eligibility and prevent possible misunderstandings. *Furnishing the employer with a copy of the schedule of training drills in advance could facilitate the employer's own work scheduling, but this is not always possible and is not required by law.* The law does not specify when the request shall be made, nor does it set any

> limit on the time that may elapse between leaving the position and actually commencing the training duty. At a minimum, the employer must allow the employee sufficient time to arrive at his training site, even if it means leaving work early. Misunderstandings may be prevented if the employer is given sufficient advance notice to plan work schedules so as to minimize any inconvenience resulting from the reservist's absence.

Department of Labor, *Veterans' Reemployment Rights Handbook*, 18-2 to 18-3 (1988) (emphasis added). The Handbook, which itself acknowledges that it does not have the force of law, *see id.* at 1, appears principally to interpret the requirements imposed by the Act. The statement that furnishing the employer with written orders "is not required by law" is not the equivalent of a statement that such a requirement by the employer violates the law. The Act provided that the reservist must be given a leave of absence to perform such inactive-training duty as was "required." 38 U.S.C. § 2024(d) (1988). To the extent that it is possible for an employee to furnish his written orders, the employer's requirement that he do so would appear to seek a reasonable form of proof that is not prohibited by the Act and that is consistent with the tenor of the Handbook. If furnishing such orders were impossible, insistence on compliance with such a requirement could be unreasonable. But the present case is not one in which it was impossible for the reservist to furnish his written orders; indeed, as discussed above, those orders had been furnished. We conclude that Gummo's cross-motion for summary judgment was properly denied.

CONCLUSION

We have considered all of the Village's arguments in support of summary judgment in its favor and have found them to be without merit. The judgment of the district court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Costs of the appeal to plaintiff.

MILTON POLLACK, *Senior District Judge*, dissenting.

I respectfully dissent.

This case involves the discharge for insubordination, lying and obstreperous conduct of a Village policeman ("appellant"), who was also a Reservist in the United States Air Force. The discharge was based on the recommendation of an impartial Hearing Officer who, after a two day hearing, found the policeman guilty of three current violations of the Department's Rules of Conduct and a history of improprieties as a police officer, involving reprimands and a suspension for misconduct. The Hearing Officer found that (i) the policeman had been disciplined for violations of the Department's rules on several prior occasions[1]; (ii) rehabilitation was no longer a reasonable prospect and (iii) the policeman had demonstrated an unwillingness and inability to work under the authority of his superior officer. The Village

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[1] Within the two years preceding his discharge, the police officer had received reprimands for misconduct towards his Shift Lieutenant and for disseminating information to the public without proper authorization. He had also been found guilty of seven counts of misconduct and suspended for 30 days following an argument with his superior officer.

Board thereupon unanimously voted to adopt the Hearing Officer's recommendation and terminated the plaintiff. There is no evidence that the parties who authorized the discharge, the Hearing Officer and the Village Board, harbored or acted upon any animus with respect to the policeman's status as a Reservist.

Following his discharge, the appellant instituted a suit for state court relief. That challenge was not perfected and was then abandoned. Three years later, in 1993, he commenced this suit alleging herein that his disciplinary history, suspensions and departmental altercations were motivated by his "status and duty as a member of the armed forces". He principally sought reinstatement and compensation for lost wages and other lost benefits.

The Village responded that it had terminated his employment only because of his insubordination and demonstrated repetitive misconduct as a police officer.

Appellant sued herein under the Veterans' Reemployment Rights Act, 38 U.S.C. § 2021, et seq., a statute enacted in 1968 which the Supreme Court interpreted in *Monroe v. Standard Oil Company*, 452 U.S. 549 (1981), to require that the plaintiff prove he was discriminitorily discharged by an employer "motivated solely by [his] Reserve status". *Id.* at 559. This interpretation, according to the 1994 Reports of the Congressional Veterans' Committees, misconstrued the intent of the 1968 Congress in enacting the law.[2] Citing these Reports, the majority opinion of this Court concludes that the *Monroe* test does not apply to this case and substitutes in its place the new and supposedly retroactive "but for" standard enunciated in the Uniformed Services Employment

[2] The "mistaken" interpretation of the applicable statute by the Supreme Court was followed by identical interpretations by the 6th, 8th and 10th Circuits.

and Reemployment Rights Act ("USERRA") [38 U.S.C. § 4301, et seq. (1994)]. This "but for" standard means that it is for the employer to establish that the discharge would have occurred even if the employee were not a member of the Reserves.

In support of the theory of a "mistaken" interpretation, the majority's Opinion cites the Report of the 1994 House Committee on Veterans' Affairs accompanying the 1994 House Bill that eventually became USERRA. In this Report, the House Committee contended that the original intent of the 1968 Congress was not the imposition of a sole motivation test to be established *prima facie* by the veteran. The majority Opinion further cites the Report of the 1994 Senate Committee on Veterans' Affairs, which included a statement, contrary to *Monroe*, that the 1994 version was merely a "reaffirmation" of the original intent of the 1968 Congress (not so expressed by the then Veterans' Committees or included in the statute itself) placing the burden of proof with respect to the affirmative defense on the employer.

In order for the 1994 revised statute to have been made applicable to pending cases such as this, the new statute would have to have said so; a congressional committee's expression of intent in these reports does not suffice to add what does not appear in the enactment:

> A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction . . . Congress, of course, has the power to amend a statute that it believes we have misconstrued . . . . No such change, however, has the force of law unless it is implemented through legislation. Even when Congress intends to super-

> sede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the "corrective" amendment must clearly appear.

Rivers and Davison v. Roadway Express, Inc., 14 S.Ct. 1510, 1519 (1994). No such implementation is clearly apparent within the text of USERRA. In fact, the only relevant language in the statute indicates an intent that the provisions of the new statute become effective on October 13, 1994 and makes no mention of retroactivity:

> The provisions of section 4311 of title 38, United States Code, as provided in the amendments made by this Act, . . . that are necessary for the implementation of such section 4311 shall become effective on the date of enactment of this Act.

Pub. L. No. 103-353, § 8(b). The majority asserts that "this provision is perhaps susceptible to differing interpretations" and offers its own interpretation: that the "codification" of the "but for" test was not one of the provisions necessary for the implementation of § 4311 and that this provision is therefore not effective on the date of enactment of the Act but at some earlier date. Although this interpretation may allow the majority narrowly to escape from the presumption that the new statute applies only from its enactment date, it certainly does not provide any clear indication of intended retroactive application.[3]

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[3] In fact, the only other discussion of an effective date in the statute confirms that no retroactive application was intended:

> (a) Reemployment—(1) . . . the amendments made by this Act shall be effective with respect to employments initiated on or after the first day after the 60-day period beginning on the date of enactment of this Act [Oct. 13, 1994].

(footnote continued)

Furthermore, the legislative history cited by the majority does not indicate clearly that the "but for" test applies retroactively:

> [this] standard and burden of proof is [*sic*] applicable to all cases brought under this section regardless of the date of accrual of the cause of action.

H.R. Rep. No. 65, 103d Cong., 2d Sess. 18 (1994). It is not specified whether the phrase "brought under this section" applies to cases "brought" in the future or also to cases that "have been brought" in the past. Nor is it clear that this language has any relevance to a prior version of "this section," which included significantly different language.

The existence of these questions indicates that although the 1994 Congressional Committees may have intended to overturn *Monroe* and to make the consequences of this change retroactive, Congress failed clearly to manifest any such intent within the statute. In *Rivers*, the United States Supreme Court concluded that a similar failure was fatal to the cause of retroactivity under § 101 of the Civil Rights Act of 1991:

> We may assume, as petitioners argue, that § 101 reflects congressional disapproval of *Patterson's* interpretation of § 1981. We may even assume that many or even most legislators believed that *Patterson* was not only incorrectly decided but also represented a departure from the previously prevailing understanding of the reach of § 1981. Those

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(2) The provisions of chapter 43 of title 38, United States Code, in effect on the day before such date of enactment, ***shall continue to apply to reemployments initiated before the end of such 60-day period.***

See Historical and Statutory Notes, 43 U.S.C. § 4301 (citing § 8 of Pub.L. 103-353) (emphasis added) (citations omitted).

> assumptions would readily explain *why Congress might have wanted to legislative retroactively*, thereby providing relief for the persons it believed had been wrongfully denied a § 1981 remedy. Even on those assumptions, however, *we cannot find in the 1991 Act any clear expression of congressional intent* to reach cases that arose before its enactment . . . . The text of the Act does not support the argument that § 101 of the 1991 Act was intended to "restore" prior understandings of § 1981 as to cases arising before the 1991 Act's passage.

Rivers, 14 S.Ct. at 1516 (emphasis added). Thus, Congress's failure unequivocally to state that USERRA applies to cases brought before the law's effective date signifies that a "sole motivation" test should be applied to cases, such as the present one, which were brought prior to October 13, 1994.

Under this "sole motivation" test, it is the plaintiff who is required to provide sufficient admissible, relevant evidence permitting the court below to conclude that his discharge was not motivated by insubordination or dishonesty, but instead solely because he was a Reservist. *See Clayton v. Blachowske Truck Lines, Inc.*, 640 F. Supp. 172, 174 (D. Minn. 1986), *aff'd*, 815 F.2d 1203 (8th Cir. 1987) (to avoid summary judgment, plaintiff must provide "evidence which raises an inference that his reserve status was the sole motivation behind his termination").

Summary judgment is appropriate in this case because there is no evidence before the Court that the plaintiff's Reservist status was a determinative factor in the decision to terminate his employment, much less the sole factor. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-

23, 106 S.Ct. 2548, 2553 (1986). In the majority's unavailing search for such evidence, the majority contends that the Department provided no satisfactory response as to why the policeman's previously submitted military orders did not meet the requirements of the Department's notification policy. However, the dispute over orders, which directly preceded the discharge, was based not only on the officer's failure to submit an order permitting the travel day, but also on the officer's delay in actually requesting the travel day:

> [e]ven though Gummo had waited until the very last moment to ask for the day off, *the Chief did not deny his request* and, according to Zolnowski, when Gummo advised the Chief, the afternoon of June 8th, that he had contacted the base that morning to arrange for a letter granting him the day off but he didn't know when it would arrive, *the Chief replied that he would abide by it and accept it even if it came in after Officer Gummo had left* (T. 253), certainly not the reaction one would expect of someone who was out to "get" the officer. I cannot find one instance during the events which transpired in [sic] regard to the instant situation, in which the Chief could be viewed as provoking Officer Gummo.[4]

(Hearing Officer's Recommendation at 52; A. 77) (emphasis added). Furthermore, the Department's request for additional proof of the necessity of a travel day does not excuse the officer's subsequent intemper-

[4] The lengthy analysis in the majority opinion indirectly impugning the *bona fides* of the Village's stated rationale for the so-called "denial" of requests that Gummo be relieved of submitting an order permitting the travel day is at odds with the explicit finding of the report of the Hearing Officer. Counsel's responses to questions regarding this "denial" at our oral hearing appear to have overlooked the content of the administrative record.

ate insubordination and lack of honesty. The police officer's unprofessional response was certainly sufficient "straw to break the camel's back", given the officer's past record of insubordination and his earlier *undisputed* violation of the Department's leave policy, for which he was suspended thirty days.

Given the substantial evidence supporting the existence of a non-pretextual reason for discharge, the entire absence of any evidence that the Village Board and the impartial Hearing Officer were motivated by hostility towards Reservists, *qua* Reservists, and the absence of evidence indicating Reservist discrimination at any time, we ought not interfere with the right of the Village to discipline its police officers for personal misconduct. The Village openly gave the appellant an unbiased independent review of all of his official conduct before an impartial Hearing Officer who conducted the administrative proceeding. Due process was all that was required. It is indisputable on this record that appellant's Reservist status was not the cause of his discharge, whichever statute applies. Neither statute permits an employee to exploit his status as a Reservist in order to shield himself from the consequences of his misconduct. *See Britt v. Georgia Power and Light*, 677 F. Supp. 1169 (N.D. Ga. 1987); *McCormick v. Carnett-Partsnett Systems, Inc.*, 396 F. Supp. 251, 256 (M.D. Fla. 1975).

I would affirm.

APPENDIX B

Memorandum and Order of the United States District Court for the Western District of New York, Dated April 28, 1995.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

93-CV-0221E(M)

WILLIAM M. GUMMO,

Plaintiff,

-vs-

VILLAGE OF DEPEW, NEW YORK,

Defendant.

MEMORANDUM and ORDER

Plaintiff Gummo, a former police officer with the Village of Depew Police Department ("the Department"), brought this employment discrimination action pursuant to the Veterans' Reemployment Rights Act ("the Act"), 38 U.S.C. §§4301-4307,[1] alleging that the defendant had fired him because of his status as a Staff Sergeant in the United States Air Force Reserve. Before this Court are the cross-motions of the parties for summary judgment pursuant to FRCvP[2] 56. The defendant's motion will be granted and the plaintiff's denied.

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[1] Before the Act was amended in 1992, these provisions were found under sections 2021-2027.

[2] Federal Rules of Civil Procedure.

The undisputed facts are as follows.[3] Gummo was a police officer with the Department from 1977 until his termination January 31, 1990. On December 12, 1986 he enlisted in the United States Air Force Reserves, which necessitated his spending one weekend of each month in military training and attending a two-week summer training session annually ("the annual tour"). During substantially the entire time of his employment, the Department's policy required police officers who were in the Reserves to provide advance notice—including submission of official military orders—of the need for time off from their scheduled duty. Gummo was informed of this policy by the Department's Police Chief Maccarone following his enlistment in the Reserves and he complied with such until October 1988 when, instead of submitting military orders he submitted a handwritten note indicating his weekend training dates for October through December. A Capt. Brennan instructed Gummo by letter dated October 20th to submit instead his military orders, and for all of the fiscal year which ended at some point in 1989. Gummo partially complied with this request, submitting on October 23rd his military orders, but only for his weekend training sessions and not those for his annual tour. Later (December 23rd) he apprised Brennan that his annual tour was scheduled for June 10 through 24, 1989 but he did not submit military orders therefor.

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[3] Such are drawn primarily from the Defendant's Statement of Undisputed Material Facts Pursuant to Local Rule 25 (now Rule 56). Because the plaintiff has, with four exceptions which will be discussed, "accepted" and not controverted the truth of such statement—*see* Plaintiff's Statement of Disputed Material Facts Pursuant to Local Rule 25—the facts set forth therein are deemed admitted. *See* Local Rule of Civil Procedure 56.

Maccarone, Gummo's "chief superior" officer, met with Gummo January 4, 1989 to discuss Gummo's failure to provide the orders. An argument ensued during which Gummo yelled and screamed at Maccarone and refused to obey Maccarone's orders that he restrain himself. (Gummo contends but Maccarone does not admit that Maccarone during this meeting called him a "liar, an "ignorant fuck," a "disgrace to the uniform" and a "sneak.") Gummo walked out of the meeting without being dismissed and said, while leaving and in the presence of others of the Department's employees, that "somebody should choke that man." *See* Deposition of William M. Gummo, at 186, attached as Exh. A to Affidavit of Nicholas J. Sargent, Esq. (sworn to October 1, 1993).

Pursuant to Section 75 of New York's Civil Service Law ("CSL"), Gummo was charged with misconduct (*e.g.*, conduct unbecoming a police officer, disobedience of an order and insubordination) and made the subject of a disciplinary hearing held February 13th and 15th by the Village of Depew's Board of Trustees. He was found guilty of seven of the nine charges and received a 30-day suspension without pay. Such sentence was not appealed.

Gummo notified Brennan May 3rd that his annual tour had been rescheduled to June 9th through June 24th and submitted orders to substantiate such. On June 7th Gummo requested, by placing a "Request for a Day Off" form under Brennan's door, that he have military leave for the work shifts for June 8th and 9th (11:00 pm until 7:00 am). Maccarone, to whom the request was referred, refused such request because it was not accompanied by military orders. Gummo personally asked Maccarone on the morning of June 8th for permission not to work that night but Maccarone replied that he could have off only if he produced the military

orders or switched shifts with another police officer. Later that afternoon Gummo told Maccarone either that his military orders or that a letter from his military unit was in the mail (Gummo claims he said letter, Maccarone that he said military orders), and Maccarone thereupon granted the request. Gummo contends that while at work later that night he notified "the defendant"—he does not specify an individual—that he would be working the shift because he had learned that the letter he had requested was not forthcoming. The defendant denies that it was ever notified. Without explanation or notice to his shift supervisor, Brennan or Maccarone, Gummo reported for work the night of June 8th, signing off duty after he had completed half (four hours) of the shift.

Maccarone never received official orders or any document from the United States Air Force re Gummo's need to have the June 8th shift off; he met with Gummo to discuss such June 27th, after Gummo had returned from the annual tour. With Gummo's knowledge, this meeting was taped. (A transcript ["Tr."] of such is attached as Exhibit B to the Defendant's Notice of Motion for Summary Judgment.) It was at this meeting that Gummo told Maccarone that he had promised a letter—not military orders— but Gummo acknowledged that neither had been sent. He further stated that he had reported to work on the 8th because he had learned from a "party" at his military unit that the letter might not be coming. Tr. at 5. When Maccarone inquired as to the identity of such party, Gummo refused to give the name and stated that he did not want to answer any more questions. Maccarone then ordered Gummo to identify the person but Gummo again refused, stating that he would not answer any more questions unless either his attorney or a union representative was present. Such order and refusal were repeated several times.

As a result of Gummo's conduct at this meeting, he was, on June 8th, charged with misconduct and insubordination. The Board of Trustees, pursuant to CSL §75, appointed a hearing officer who, after conducting a two-day hearing, found Gummo guilty of misconduct and recommended that he be discharged. Gummo did not appeal this determination. By resolution adopted January 31, 1990 the Board of Trustees accepted this recommendation and terminated Gummo.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *See* FRCvP 56(c). In making such determination, a court must view the facts in the light most favorable to the non-movant and any doubts as to the existence of a genuine issue for trial should be resolved against the moving party. *Brady v. Town of Colchester*, 863 F.2d 205, 210 (2d Cir. 1988). The moving party bears the initial burden of establishing that no genuine issue exists as to material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If, as here, the non-movant bears the burden of proof at trial, the moving party may satisfy its burden by demonstrating an absence of evidence to support an essential element of the non-movant's claim. *Id.* at 325. Once the moving party has established its initial burden, the non-movant must set forth specific facts showing that there is a genuine and material issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Such a showing must consist of more than a "scintilla of evidence;" the non-movant must show that there is evidence on the basis of which a reasonable juror could return a verdict in his favor. *Id.* at 252. Thus, if the non-movant fails to make such a showing re any essential element of a claim, summary

judgment on that claim is appropriate. Given the instant cross-motions for summary judgment, each will be evaluated under the foregoing standards.

Section 4301(b)(3) of the Act provides that "any person who [is employed by a political subdivision of a state] shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment *because of* any obligation as a member of a Reserve component of the Armed Forces." (Emphasis added). The purpose of this section is to prohibit employment discrimination against Reservists "motivated solely by reserve status." *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981). Thus, if a Reservist's employment is terminated for reasons other than his status, the section is inapplicable. *Kitsakos v. Brown*, 848 F.Supp. 459, 462 (S.D.N.Y. 1994).

The record is replete with evidence of Gummo's refusal to obey orders, insubordination and failure to comply with the Department's policies. He does not controvert most of this evidence but disputes the characterization of such as "misconduct." Regardless of how these uncontroverted facts are characterized, it was found during the CSL §75 proceeding that Gummo was guilty of misconduct and insubordination such as to constitute good cause for discharge. Because Gummo does not controvert the identity of the factual issues involved in the instant case and in the section 75 proceeding, or that he had a full and fair opportunity to contest them in such proceeding, he is collaterally estopped under New York law from disputing the findings of fact made therein—*see Town of Huntington v. New York State Division of Human Rights*, 181 A.D.2d 827, 581 N.Y.S.2d 381 (2d Dept. 1992)—and thus also under federal law. *Romano v. Thunder Projects, Inc.*,

696 F.Supp. 831, 833 (N.D.N.Y. 1988). As a matter of law then, Gummo's Reserve status was not the sole reason for his discharge and the defendant is entitled to summary judgment.

Assuming *arguendo* that Gummo was not collaterally estopped from contesting these issues, summary judgment would still be warranted because Gummo has offered no affirmative proof that even hints that he was discriminated *because of* his Reserve status. For example, no proof is offered suggesting any possible motive for the defendant's alleged discrimination. Instead, Gummo's entire argument rests on his allegation that the defendant's requirement that written orders be submitted prior to being granted military leave is "unlawful." Gummo then reasons that his misconduct resulted from this allegedly unlawful requirement, which in turn led to his discharge because he was "provoked" by this unlawful conduct. In other words, Gummo seems to be arguing that but for the defendant's policy, he would never have gotten into the arguments with Maccarone that resulted in his discharge. Beyond the fact that Gummo cites no authority that the defendant's policy was unlawful, this argument—in the absence of any allegation that the policy was designed to hinder Reservists from participating in their military duties—is not probative of and has no logical connection to whether the defendant discriminated against him because of his Reserve status. It therefore is unavailing.

Accordingly, it is hereby ***ORDERED*** that the plaintiff's motion for summary judgment is denied, that the defendant's motion for summary judgment is granted and that this case is dismissed with prejudice.

DATED: Buffalo, N.Y.
April 28, 1995

/s/ JOHN T. ELFVIN
U.S.D.J.

APPENDIX C

Judgment of the United States District Court for the Western District of New York, Dated May 2, 1995.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

93-cv-0221-E(M)

WILLIAM M. GUMMO,

Plaintiff,

v.

VILLAGE OF DEPEW, NEW YORK,

Defendant.

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came ~~to trial~~ or hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted and the case is dismissed with prejudice.

May 2, 1995
Date

RODNEY C. EARLY
Clerk

FILED
95 MAY—2 AM 9:49
U.S. DISTRICT COURT
W.D.N.Y.—BUFFALO

/s/ JANE M. DENNIS
(By) Deputy Clerk

Supreme Court, U.S.
FILED
APR 10 1996
CLERK

No. 95-1465

IN THE

Supreme Court of the United States

October Term, 1995

VILLAGE OF DEPEW, NEW YORK,
Petitioner,

vs.

WILLIAM M. GUMMO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does Section 4311(b) of the Uniformed Services Employment and Re-employment Rights Act, 38 U.S.C. §4311(b), apply to cases where the cause of action occurred prior to its enactment?

2. Did the United States Court of Appeals for the Second Circuit err in vacating the judgment of the District Court on the factual issue of motivation of respondent's discharge and remanding the cause for trial?

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OPINION BELOW

The only opinion involved in the Petition for a Writ of Certiorari is the decision of the U.S. Court of Appeals for the Second Circuit issued on January 19, 1996 and published at 75 F.3d 98 (2d Cir. 1995). In an order dated February 13, 1996 the Second Circuit granted a thirty (30) day stay of the mandate.

STATEMENT OF THE CASE

Respondent submits this Brief in Opposition in response to the Petition for a Writ of Certiorari submitted by petitioner. This Brief provides respondent's reasons for denying the Writ, and corrects petitioner's mischaracterization of the actual record developed below, as well as of the scope and effect of the opinion for which Petitioner seeks review.

Respondent adopts the full statement of the procedural history and facts set forth in the District Court opinion, (Pet. App. B, p. A-33), and in the Second Circuit (Pet. App. A, pp. A-2 - A-3).

ARGUMENT

The decision of the Second Circuit is correct, presents no conflict with decisions of this Court or any other Court of Appeals and poses no significant questions of federal law requiring this Court's attention. Accordingly, further review is unwarranted.

I. The Second Circuit's Application of 38 U.S.C. §4311(b) to this case was correct in view of both the statutory language and the legislative history of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

The original Veteran's Reemployment Rights Act, 38 U.S.C. §2021, *et seq.* (VRRA) was first enacted in 1940, and before its recodification in 1974, was found at 50 U.S.C. App. §459. *Monroe v. Standard Oil Co.*, 452 U.S. 549, 554-555 (1981). It was not until 1968, however, when 38 U.S.C. §2021(b)(3) was enacted, that Reservists and National Guardsmen were given protection against discrimination, such as termination from employment, "because of" their military obligation. *See Monroe*, 452 U.S. at 556-56.

This Court, in interpreting the effect of §2021(b)(3), stated that:

> The legislative history thus indicates that §2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, motivated solely by reserve status.

Monroe, 452 U.S. at 559.

Five years after this Court decided *Monroe*, in 1986, Congress amended then § 2021(b)(3) by including language that "made it clear that an employer could not refuse to hire an individual because of his or her participation in the Reserves or National Guard." *Boyle v. Burke*, 925 F.2d 497, 502 (1st Cir. 1991). Included in the legislative history of this 1986 amendment is the statement by Congressman G.V. Montgomery, Chairman of the House Veteran's Affairs Committee and sponsor of the amendment that:

> Additionally, it should be noted that the implication in the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981), that a violation of section 2021(b)(3) occurs only when the Reserve obligation is the sole motive in the adverse action taken by the employer, is totally inconsistent with the "but for" or "same decision" analysis discussed

> above. Such a concept would allow an employer to escape liability by simply asserting a reason which, by itself, could not justify the adverse action, but would make the action other than solely based on the military obligation. For example, if a company had a policy of discharging employees who were absent without cause five times in 6 months and discharged a reservist who had five absences, two of which were due to his military obligation, the discharge would not be "solely" because of this Reserve obligation, but it also could not stand on its own once the protected absences were omitted.

132 Cong. Rec. H9297 (October 7, 1986).[1]

Notwithstanding this 1986 legislative history, two courts of appeals and one district court expoused the "motivated solely" test of *Monroe* which the Village of Depew contends is the test to be applied to all causes of action which occurred prior to October 13, 1994, the date of enactment of USERRA.

What the Village ignores however is that in all of the cases it cites in support of its claim, the courts *in fact* applied the "but for" test. Thus in *Clayton v. Blachowske Truck Lines, Inc.*, 815 F.2d 1203 (8th Cir. 1987), the Eighth Circuit noted that "the record

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[1] The initial hire protection was a House bill, with no comparable Senate version. *See* 1986 U.S. Code Cong.-Admin. News at 5594. The explanations of an amendment by the bill's sponsor "are an authoritative guide to the statute's construction." *North Haven Board of Education v. Bell*, 456 U.S. 512, 527 (1982).

showed that he had not been terminated solely because of his Reserve status." *Id.* at 1205. The district court had held that: "Three of the four reasons [for the termination] were unrelated to his guard duties and are supported by the evidence." 640 F.Supp. 172, 174 (D. Minn. 1980).

Similarly, in *Sawyer v. Swift & Co.*, 836 F.2d 1257 (10th Cir. 1988), the Tenth Circuit found that "there were sufficient other, non-pretextual, reasons irrelevant to his military status [to justify the termination]." *Id.* at 1262. To the same effect is *Britt v. Georgia Power Co.*, 677 F.Supp. 1169 (N.D. Ga. 1987) ("Britt's decision to defy the direct orders of his supervisors was an independent and significant reason for the discharge.") *Id.* at 1174, 1175.[2]

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[2] The issue in *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245 (6th Cir. 1988) was simply whether the National Guardsman's 15 minute notice of an impending three-week-absence was insufficient under 38 U.S.C. §2024(d). The Sixth Circuit concluded that:

> [It] is apparent to us that no reasonable fact finder could conclude other than that Burkart deliberately knew his notice was too short and would be so viewed by his employer, and that Burkart thereby sought to trigger his own discharge so that he could not only go on military duty but also return, not to his job, but to unemployment compensation.

Id. at 1250. In the case at bar, the Village of Depew did not object to the timelines of respondent's request, but rather conditioned Officer Gummo's release on production of orders that had been previously furnished. *Gummo*, 75 F.3d at 108.

On the other hand, the Seventh Circuit in *Pignato v. American Trans Air, Inc.*, 14 F.3d 342 (7th Cir. 1994) directly applied the "but for" test: "The forbidden motive, [military status] in this case must be a sufficient condition, or but-for cause, of the employee's termination." *Id.* at 349. And, the First Circuit in *Chesna v. International Fueling Co., Inc.*, 102 Lab Cas (CCH) ¶ 11,230 (1st Cir. 1989) did not "feel it necessary to determine whether *Monroe* requires reserve status to be the *sole* reason for dismissal or simply *a* reason." *Id.* at p.23,050; emphasis, the court's.

With this "precedent" in mind, Congress undertook to replace the VRRA in its entirety to "clarify, simplify, and, where necessary, strengthen the existing veteran's employment and re-employment rights provision. H.R. Rep. No. 103-65, 103d Cong., 2d Sess. at 18 (House Report) *reprinted in* 1994 U.S. Code Cong. and Admin. News at 2449.

As noted by the Second Circuit in this case, Congress replaced the "because of" language of section 2021(b)(3) with language that states that an employer violates the Act if an employee's "obligation for service in the uniformed service is a motivating factor in the employer's action, unless the employer can prove that he action would have been taken in the

absence of such . . . obligation." 38 U.S.C. §4311(b). This is clearly an expression of the "but-for" test.

That Congress intended that the "but-for" test be applicable to all discrimination cases brought under either VRRA or USERRA, regardless of the date of accrual of the cause of action is unequivocal and no court to date has held differently.[3]

The Second Circuit in this case studiously recited the legislative history of § 4311(b) of USERRA, including the house report (75 F.3d at 105-106), the Senate Report (*Id.* at 106 and the Joint Explanatory Statement (*Id.*), before concluding that:

> Given Congress's clear statements as to its original intent in enacting the VRR and its wish to have the courts apply §4311(b) in accordance with that intent to all cases regardless of their vintage, we conclude that the district court should not have employed the sole-motivation analysis adopted by *Monroe* and its progeny.

Id.

The Village of Depew does not challenge the clear import of the legislative history, as it cannot, but rather argues that "Congress must provide a 'clear

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[3] Two district courts have applied the "but for" test of USERRA to pre-USSERA causes of action. *See Hanson v. Town of Irondequoit*, 896 F. Supp. 110, 114 n.3 (W.D.N.Y. 1995); *Novak v. MacKintosh*, 1996 U.S. Dist. __ LEXIS 3892 (D.S.D. 1996).

statement' in the text of the statute sufficient to defeat the presumption against retroactively." Pet. at 14. This is an incorrect interpretation of this Court's decisions in *Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 114 S.Ct. 1510 (1994) and *Landgraf v. USI Film Products, et al*, ___ U.S. ___, 114 S.Ct. 1483 (1994), upon which the Village relies.

Indeed, in both *Rivers* and *Landgraf*, the Court took pains to emphasize that a review of the legislative history of the statute at issue failed to find "evidence of an agreement among legislators on the subject." *Rivers*, 114 S.Ct. at 1517n.8. *See also, Landgraf*, 114 S.Ct. at 1495: "The relevant legislative history of the 1991 Act reinforces our conclusion that §§ 402(a), 109(c) and 402(b) cannot bear the weight petition places upon them . . . The legislative history discloses some frankly partisan statements . . . but these statements cannot plausibly be read as reflecting any general agreement."

Quite the opposite is true in this case. USERRA passed by unanimous vote in both Houses of Congress, both before and after the conference which reconciled each chamber's bills. And, as is set out in detail in the Second Circuit's decision, both the House and Senate Reports make clear that the "but-for" test was to apply to all cases "'*regardless of the date of*

accrual of the cause of action.'" *Gummo*, 75 F.3d at 106; emphasis the court's.

As a final note, the Village states that "*Monroe* has been cited in almost 200 opinions, and no court considering *Monroe* has ever questioned its holding that the adverse employment action . . . must be solely motivated by reservist status to warrant redress under the Act." Pet. at 12 n.3. Not only is this statement incorrect (*see Pignato; Chesna* cited *supra* herein at 6; *see also Cook v. 84 Lumber*, 99 Lab. Cas. (CCH) ¶10,639 at p. 20,077 (N.D. Ohio 1983)), but it is grossly misleading. Of the opinions citing *Monroe*, some are not veteran's re-employment rights cases (*see e.g. Lehman v. Nakshian*, 453 U.S. 56, 163 (1981)) and most of the others deal with non-discriminatory issues (*see e.g. Perz v. School City of Hammond*, 29 F.3d 899, 899, 900 (7th Cir. 1994); *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240, 243 (8th Cir. 1991); *Colon v. County of Shawnee*, 875 F.2d 594, 596 (10th Cir. 1987)).

In fact, since *Monroe*, there have been 55 reported decisions which have mentioned section 2021(b)(3).[4] Nine of these decisions are the appellate decisions of reported district court decisions. Of the 46 remaining decisions, only 28 implicated, while not necessarily

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[4] Ascertained through a LEXIS search.

discussing, the standard of proof at issue here, an average of two decisions per year.[5]

In view of the fact that so few cases will be impacted by the application of the "but-for" test to pre-USERRA causes of action, there is no compelling or significant issues of federal law to be decided.

II. This Court should not decide whether the Second Circuit's order vacating and remanding the judgment to ascertain the factual issue of motivation was in error.

The Village of Depew has also requested that this Court review the factual record in this case to determine whether the remand by the Second Circuit was appropriate. In essence, the Village is arguing its case on the merits, a matter that is to be left to the district court.

Having found that Officer Gummo had established a *prima facia* case of reserve discrimination, having found that "a jury could reasonably infer that the denial of Gummo's leave request . . . was pretextual," (75 F.3d at 108) and having found that the district court applied the wrong

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[5] It is thus abundantly clear why there have been only three decisions in the almost 1 1/2 years since the enactment of USERRA that have dealt with the "but-for" issue.

legal standard of proof, the vacating of the judgment and remanding the case back to the district court was totally appropriate.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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